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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 715.

THE COLUMBUS RAILWAY POWER AND LIGHT COMPANY, APPELLANT,

vs.

THE CITY OF COLUMBUS, OHIO, ET AL., APPELLEES.

No. 739.

I. TUCKER BURR ET AL., APPELLANTS,

vs.

THE CITY OF COLUMBUS, OHIO, ET AL.

REPLY BRIEF FOR APPELLANTS, PLAINTIFFS BELOW.

Appellees apparently rely with confidence upon certain cases cited in their brief, to which we wish to call the Court's attention.

Fort Loramie vs. C. P. Gress, cited at pages 44, 61 of Appellees' Brief:

At pages 43, 44 of their brief, opposite counsel say:

> "*The only decision in Ohio*, on the question of whether or not a franchise for a definite period with

> a schedule of operation, is permissive only or binding during the full term, is the case of Fort Loramie *vs.* C. P. Gress, which was decided by the Ohio Court of Appeals, Fourth Circuit, on the 9th day of July, 1918 (not yet reported). Later the Supreme Court overruled a motion to require the Court of Appeals to certify the record of this case, so that this decision stands as the final authority in Ohio."

This statement is not correct. Following the decision of the Court of Appeals in that case the plaintiffs in error, Gress and others, filed their motion to require the Court of Appeals to certify its record to the Supreme Court of Ohio for review. They also filed their petition in error in that Court *as a matter of right* because of the constitutional question involved in the case. It is true that the Supreme Court of Ohio on the 26th day of November last overruled the motion to certify the record, but that court, in doing so, expressly said:

> "While the case is one of public interest, the plaintiff in error may seek a remedy before The Public Utilities Commission of Ohio."

It is not true, therefore, that "this decision stands as the final authority in Ohio." The Supreme Court, by its decision, expressly pointed the parties to another remedy, viz: Before the Public Utilities Commission of Ohio, whose decision if it shall be adverse to the plaintiffs in error, is subject to review by the Supreme Court of Ohio.

The case has not yet been heard by that court upon the petition in error filed by the plaintiffs in error, and the case now stands for argument and submission on the 16th day of this month, the controlling question being the constitutional question involved, viz: Whether the judgment rendered by the Court of Common Pleas and affirmed by the Court of Appeals violates the prohibitions of the Fourteenth Amendment of the Federal Constitution.

City of Potwin Place vs. Topeka R. R. Company, 51 Kan., 609:

This case is cited and quoted from on pages 46, 47 of the brief of appellees. In this case, which is so confidently relied upon by opposing counsel, the company had operated certain lines of street railway in the city under an ordinance which authorized the construction of the road and required a stated car service on those lines. Potwin Place at the time when suit was brought had apparently become a part of the city of Topeka, and the railway company was of course operating many other lines in Topeka, in addition to those in the old city of Potwin Place. In furtherance of its plan to extend its lines through the addition of Auburndale and thence to the Insane Asylum, the company asked the city council to permit the abandonment of the then route through Potwin Place and to designate a new route through Auburndale in the direction of the asylum. The route proposed to be abandoned included Willow and Elmwood Avenues and two blocks on Laurel Avenue, and upon refusal of the council to grant the company's request, the latter ceased to operate its line on that route, and the city brought proceedings in mandamus to compel the company to resume operation there. The court ordered the resumption of service on Willow and Elmwood Avenues, but declined to order it as to the two blocks on Laurel Avenue, the latter on the ground that operation on Laurel Avenue might militate against adequate service for Auburndale, just as the company had claimed that it would. The case, therefore, is plainly distinguishable from the case at bar for several reasons, viz:

(1.) There the street railway company was not, as it is in the case at bar, attempting to surrender *in toto* its right to operate in the city, but, on the contrary, it was seeking in that case to *continue* operation, but over a new route.

(2.) The question was not one of confiscatory rates but of substituted routes.

(3.) The court, in refusing to order the operation of cars on Laurel Avenue definitely divided the company's franchise and permitted it to abandon a part of the franchise, while retaining the remainder of it, so that the case is not even an authority upon the point that a company must abandon all or none of its franchise rights.

(4.) The court in its opinion (page 11) says: "It is not seriously contended that the old line is unprofitable."

Loader vs. Brooklyn Heights Railroad Co., 35 N. Y. Supp., 996:

This case which is cited on pages 48 and 74 of brief of appellees, did not involve operation that would result in bankruptcy, nor was *vis major* an element in the case, as it is in the cases at bar.

Paige vs. Schenectady R. Co., 178 N. Y., 102:

This case is cited at page 49 of appellees' brief. It simply dealt with the right of the company to abandon its route on a certain street; and none of the elements of the cases at bar were present in it.

The last three cases typify most of those cited by opposite counsel, and consequently it is not worth while to distinguish them *seriatim*.

A large part of appellees' brief is devoted to an effort to establish that the Columbus Company is bound by the rate schedules in the two franchise grants. If these two grants are still in force, appellees' claim that the company is bound by the rate schedules therein prescribed, would be stronger. These grants were expressly surrendered and abandoned by

See Cleveland v. Cincinnati Co. 67 O.St. 197
Wood v. Columbus, 220 Mass. 41
Shaw v. Ry Co, 173 Fed. 751

the Columbus Company by written communication addressed and delivered to the city of Columbus August 20, 1918. If this surrender and abandonment was justified and effective, the franchise grants are no longer in existence, and the rate schedules are likewise no longer in existence. The rate schedules, by reason of changed conditions, became confiscatory, and appellants used them as the basis for the surrender and abandonment of the franchise grants, claiming that this situation brought the Columbus Company within the scope of the Fourteenth Amendment. Appellants do not rely upon the Fourteenth Amendment as a protection against the enforcement of the rate schedules only, but as a basis and justification for the surrender and cancellation of the franchise grants and a protection against their threatened enforcement. The issue presented between the parties on this branch of the case is whether the surrender and cancellation of the grants was justified under the Fourteenth Amendment. The Fourteenth Amendment prohibits the State from depriving the Columbus Company of its property without due process of law. The franchise grants were legislative enactments, being laws of the State enacted by the city under delegated power. The enforcement of these laws would require the company to devote its private property to public use without just compensation, and would, therefore, deprive it of its property without due process of law. The application of the Fourteenth Amendment seems clear.

The appellees contend that the rate schedules in the franchise grants do not represent the exercise of legislative power by the city, but rather the exercise of its proprietary or business power, and that the enforcement of the rate schedules would not be the enforcement of State action. The rate schedules are so closely indentified with the franchise grants, being one of the "terms or conditions" of those grants, that it is difficult to separate the two. The *grants of the franchises* are clearly legislative enactments, even if the rate

schedules evidence an exercise of the city's proprietary or business powers. It must always be remembered that appellants are endeavoring to enjoin, not directly, the enforcement of the rate schedules, but, on the contrary, the enforcement of the franchise grants—the enforcement of the exercise of the franchises which the city has granted—, and, incidentally only as the result of the granting of the relief prayed for, the city will be enjoined from enforcing the rate schedules. There is no basis for the contention that the injunction prayed for is not an injunction against threatened State action.

Appellees further contend that the company is estopped from asserting any claim for protection under the Fourteenth Amendment. They rely upon the contracts evidenced by the two franchise grants and acceptances to establish the estoppel. They argue that each grant and acceptance represents a contract, and that each contract binds the company to continue operations thereunder for the term of twenty-five years therein prescribed, and that this obligation continues in force even though the prescribed rates are confiscatory and the result would necessarily be bankruptcy. There is no obligation in either one of these franchise grants to continue operations thereunder for the term of twenty-five years therein mentioned upon the terms and conditions therein prescribed. Even if the grants contained such agreements, the result would not be different, for the Fourteenth Amendment must be read into each grant, and each grant must be interpreted so that each provision of the grant will be given its proper effect. If the grants did, in fact, contain an agreement to continue operation for the term named, which we deny, the interpretation would probably be that this agreement would have no further force and effect if the rates prescribed should become confiscatory. This would present a question of interpretation. Appellees, in order to sustain their position, must establish an estoppel, something

in the nature of a waiver by the company of its right to claim the protection of the Fourteenth Amendment. On the admitted facts any such agreement to continue operations under the grant would not constitute a basis for any such estoppel.

In this connection, we have been considering the case on the supposition that these grants contained an agreement on the part of the company to continue operation thereunder for the term therein named. *There is no such agreement;* the grants are permissive strictly, granting to the company the *permission* of the city to occupy the streets for street railway purposes upon the "terms and conditions" therein named. There is no language, either in the ordinances or in the acceptances, which impose any obligation upon the company to continue to exercise the franchises or privileges granted for the term named. So far as these contracts are concerned, the franchises and privileges granted might be surrendered at any time. The terms and conditions named are terms and conditions which, if not complied with, would justify a forfeiture by the city of the franchises and privileges granted, but the language will not justify the interpretation that the company has entered into any contractual obligation to continue to comply with these terms and conditions for any longer period than it cares to exercise the franchises.

If it be claimed that there is something in the nature of a duty imposed upon the company to continue to serve the public, and that this duty requires the company to continue to serve the public upon the terms and conditions for the period prescribed in these grants, the fact that the rate schedules have become confiscatory is a complete answer, for it is an adequate reason for the surrender and cancellation of these particular grants and is sufficient to satisfy the suggested duty. The company is quite ready and willing to serve the public if the public will allow it to charge com-

pensatory rates. These franchise grants present no basis for the suggested estoppel.

Plaintiffs and appellants respectfully submit that they are entitled to the injunction for which the bills pray.

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CITY OF COLUMBUS, a c

Defendant and Appellant,

SUGGESTION

ON QUESTION WHETHER THESE CASES HAVE BECOME MOOT CASES.

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Plaintiffs and Appellants.

IN THE

Supreme Court of the United States

October Term, 1918. No. 739

I. TUCKER BURR, *et al.*
Plaintiffs and Appellants

vs.

CITY OF COLUMBUS, *et al.*
Defendants and Appellees

SUGGESTION ON QUESTION WHETHER THESE CASES HAVE BECOME MOOT CASES

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

NOW COME I. Tucker Burr, Winthrop Burr, A. Lawrence Pierson, Thomas S. Gannett, Jr., Constantine Hutchins, Richard Austin, James W. Wheeler and William J. Sturgis, plaintiffs and appellants in case No. 739 and file this their suggestion upon the question whether said case No. 739 has now become a moot case.

Your petitioners respectfully represent that the abovementioned case No. 739 presents primarily the question whether the street railway franchises under which the railway lines of the The Columbus Railway, Power and Light Company were operated prior to August 20, 1918, were on that day cancelled and surrendered by said company. Your petitioners contend that said franchises were on that day cancelled and surrendered, but, on the other hand, the defendants and appellees contend that said company had no such right or power and that said franchises were not in fact cancelled and surrendered. The bill prayed for an

injunction against the defendants to restrain them from enforcing the terms and provisions of the said franchises. The District Court denied this prayer. This case was set down for hearing in this court on January 6, 1919, together with the case of The Columbus Railway, Power and Light Company vs. City of Columbus, *et al.*, No. 715, which presents similar questions, and the two cases were argued together on January 10, 1919.

In a suit entitled Slaymaker vs. The Columbus Railway, Power and Light Company, *et al.*, in the Court of Common Pleas of Franklin County, Ohio, a stockholder of said company, suing for herself and other stockholders, filed a bill on December 23, 1918, against the company, all of its directors and certain other defendants, for the purpose, *inter alia*, of recovering from the said directors heavy damages alleged to have resulted to the company from the effort of the said directors to cancel and surrender said franchises. In this same case the stockholder, plaintiff, asked that a receiver be appointed to take possession of and to operate the properties and franchises of said Columbus Company. The application for a receiver was heard on January 6, 1919, and the hearing was continued on January 8th, and again on January 10th. The court, during the hearings on the 6th and the 8th, indicated an intention to appoint a receiver, in part because of the attempted cancellation and surrender of the railway franchises, as recited above, which the court held was an illegal, unauthorized and invalid act on the part of the company.

On January 9, 1919 there were several changes in the Board of Directors of the Columbus Company, certain directors resigning and others being elected directors in their places and at a meeting of the Board of Directors of the company held on the evening of January 9, 1919, the following resolution was adopted:

> "*Resolved*, that this Company rescind the action of its Board of Directors and officers to surrender its

street railway franchises and that operation of its street railway system be immediately resumed, in accordance with the terms of its franchises."

At the hearing in said Slaymaker case, on January 10th, a copy of this resolution was presented to the court and the testimony of one of the directors of the company was taken, advising the court of many material facts. The application for a receiver was denied on that day.

Your petitioners further represent that in a communication dated January 27, 1919, addressed to the Hon. James D. Maher, clerk of this Court, by the City Attorney of the City of Columbus, one of the defendants and appellees in the above-recited two cases, said City Attorney enclosed a paper containing a copy of said resolution and suggested that perhaps these cases may have become, by virtue of the above-recited resolution, moot cases and in said communication the City Attorney stated that he was advising the court of the passage of this resolution in order that he might perform his full duty to this Court, but expressed his desire that the cases should be decided.

Your petitioners further represent that this resolution may perhaps be effective to reinstate the franchises which the company had theretofore undertaken to cancel and surrender and, further, that if the directors were liable for their attempted cancellation and surrender, this liability may be limited to such damages, if any, as may have resulted to the company between the date of the resolution of surrender and cancellation, August 20, 1918, and the date of the above recited resolution, to-wit, January 9, 1919, but your petitioners deny that either case No. 739 or case No. 715 has become a moot case by reason of the adoption of the above-recited resolution by the Board of Directors of the Columbus Company and in support of this position your petitioners present the following reasons:

1. If it be admitted that the said franchises were in fact cancelled and surrendered by the resolution of the

Board of Directors of the company, adopted on August 20, 1918, and the action taken in pursuance of that resolution and it be further admitted that the effect of the above-recited resolution of January 9, 1919 is to reinstate said franchises, it is none the less true that a new attempt may be made at any time by the company to cancel and surrender the said franchises and it is important that both the company and the city should have the question determined whether such right of cancellation and surrender exists or not. The rights of the parties in this regard should be determined as a guide for further future action and the question of the existence or non-existence of this right is not only important for said parties and for the people of the City of Columbus, but is at the present time, in the present condition of the street railway industry of the country, a question of great public interest and importance.

In similar cases this court has retained jurisdiction and determined the questions presented. See *United States vs. Trans-Missouri Freight Assn.*, 166 U. S. 290, 41 L. Ed. 1007 and *Southern Pacific Terminal Co. vs. Interstate Commerce Commission*, 219 U. S. 498, 55 L. Ed. 310. This subject was later considered in *United States vs. Hamburg-Amerikanische Co.*, 239 U. S. 469, 60 L. Ed. 387, in which this court dismissed the appeal on the ground that the case had become a moot case, but without prejudice to further proceedings. The distinction between that case and the two cases last cited was pointed out. The present case comes within the principle of said last two cases. See also *Boise City I. & L. Co. vs. Clark*, 131 Fed. 415, 419 and *Jewell T. Co. vs. Plaut*, 240 Fed. (C. C. A.) 945 and cases there cited.

2. Under the agreement set forth in Section 15 of the amended bill in No. 715 (Record p. 49) and also set forth in Section 17 of the bill in No. 739 (Record p. 9) relating to the issue of rebate checks, such checks aggregating over $100,000, have been issued by the company and are now outstanding in the hands of the public and the liability of the

company to redeem these checks depends upon the decision of this court in these cases. Even if it be admitted that the effect of the above-recited resolution of January 9, 1919 is to reinstate the said franchises, such resolution cannot have the effect of imposing liability upon the company to redeem said rebate checks, but that liability must necessarily depend upon the question whether the company had the right to cancel and forfeit said franchises and did cancel and forfeit them by its resolution of August 20, 1918 and action taken in pursuance thereof, and this question is the principal question presented in these cases.

3. If it be admitted that the rights of the company in case No. 715 may have been materially affected by the adoption of the above-recited resolution by its Board of Directors on January 9, 1919, and on that account said case No. 715 may be held to have become a moot case (which your petitioners deny) the same is not true of case No. 739, for the reason that certain rights accrued to the plaintiffs and appellants in No. 739 by virtue of the resolution of cancellation and surrender adopted by the Board of Directors of the company on August 20, 1918 and the cancellation and surrender thereby effected, which said rights said plaintiffs and appellants are asserting in No. 739 and they cannot be and were not deprived of said rights by the above recited resolution of January 9, 1919. The enforcement of said franchises would necessarily result in injuring and wasting the mortgage security for the bonds held by your petitioners and, in addition, the interests of your petitioners would be materially injured by the payment of over $100,000, by the company in redemption of rebate checks, for which your petitioners claim that the company is not liable. The City Council of the City of Columbus took no action in pursuance of and in relation to the said resolution of August 20, 1918, nor has it taken any action in pursuance of or in relation to the above recited resolution of January 9, 1919.

4. No party to either of the pending two suits has as

yet asked that they or either of them be declared moot cases and dismissed on that account.

Your petitioners respectfully submit that these two cases are not moot cases and should not be dismissed on any such ground.

Respectfully submitted,

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JOSEPH S. CLARK
Attorneys and Counsel for I. Tucker Burr, et al., Plaintiffs and Appellants.

February 21, 1919.